MINING LEGISLATION IN CANADA

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Many of the disputes between the United States and Canada concerned fishing rights, and the fisheries of Canada are certainly valuable. Few, however, realize that the mines of the Dominion are already entitled to credit for a production exceeding that of the fisheries and lumber industry combined.

For some years past, those interested in the development of the increasingly important mining industry of Canada have urged the adoption by the Dominion Parliament of a federal mining law, which would have the force and stability of statutory enactment. At present, placer mining in the Yukon Territory is governed by the Dominion statute known as the Yukon placer-mining act. All other mining under federal jurisdiction is governed by orders in council and ministerial regulations.

In the earlier stages of development, it is perhaps inevitable that these important matters should be so dealt with; but it is now felt that the time has come when mining rights in the extensive regions under federal control should be put on a permanent basis, and that any changes required from time to time should be made only after full and open discussion in Parliament.

A short sketch will suffice to indicate how vast and varied the interests affected really are.

When the Dominion of Canada was constituted by the imperial statute known as the British North America act of 1867, which came into force by proclamation on July 1st of that year, it comprised only the Provinces of Ontario, Quebec, Nova Scotia and New Brunswick; but provision was made for the subsequent inclusion of Newfoundland, Prince Edward Island, British Columbia, Rupert's Land and the Northwest Territories. Subsequently Rupert's Land and the Northwest Territories were acquired, the Crown Colonies of British Columbia and Prince Edward Island were admitted, and all the other British territories and possessions in North America,

with the islands adjacent thereto, except Newfoundland and its dependencies, were annexed to Canada by Great Britain.

Canada, consequently, now comprises the whole of the northern half of North America, except Alaska, Newfoundland and that portion of Labrador which constitutes a dependency of Newfoundland. All lands, mines, minerals and royalties belonging at the time of the union to the several provinces of Canada (Ontario and Quebec), Nova Scotia and New Brunswick, are declared to belong to that one of the said provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situated or have their legal origin—subject, however, to any trusts existing in respect thereof or any interest therein other than that of the province.

Each of the provinces named has exclusive jurisdiction to make laws for the management and sale of its public lands and of the timber and wood thereon, and also as to property and civil rights in the province.

When discussing the extent of this jurisdiction, Mr. Justice Riddell, in Florence *v.* Cobalt, said:

"This is a matter of property and civil rights, by the B. N. A. act this is wholly within the jurisdiction of the legislature of the province; in matters within their jurisdiction, the legislatures have the same powers as Parliament, and the power . . . of Parliament is so transcendent and absolute, that it can not be confined, either for causes or persons within any bounds. . . . It has sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws concerning matters of all possible determinations. (Blackstone, Commentaries I, p. 160.) . . . 'Within the jurisdiction given the legislature of the province, no power can interfere with the legislature, except of course the Dominion authorities, which interference may occasion disallowance. There is no need of speaking of the paramount power of the imperial Parliament.'"

"In short, the legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule, human or divine": and later in his judgment the learned judge said, "We have no such restriction upon the power of the legislature as is found in some of the States."

With some exceptions, not necessary to be here specified, the same rules were made applicable to Prince Edward Island and

British Columbia. But very different conditions and regulations obtain in the remaining parts of Canada.

Under the sanction of an imperial statute, the Dominion of Canada obtained a surrender of the lands and territories granted by Charles II in 1670 to the Governor and Company of Adventurers trading into Hudson's Bay, known as the Hudson's Bay Company; and Rupert's Land and the Northwest Territories were consequently admitted into the Dominion as of July 15, 1870.

When the Provinces of Manitoba, Saskatchewan and Alberta were formed, the lands, mines and minerals, with slight exceptions, were not transferred to the provinces, but remained the property of the Dominion of Canada and subject to federal jurisdiction and control.

The proposed federal mining law must deal with the mines and minerals of these three provinces, of all the territories, including the Yukon Territory, and of certain areas of the older provinces, principally the Indian lands and railway belts of British Columbia. It must, therefore, deal with placer-mining, coal, natural gas, oil, petroleum, gold, silver, copper and the other minerals. The whole field must be covered and every problem of mining law solved.

The framing of this general law is regarded by mining men as supremely important, not only on account of the great interests actually and potentially involved, but also because it is looked upon as the first step towards the unification of the mining laws of Canada. The vital importance of such completeness, wisdom and practical convenience being embodied in the federal statute as will recommend it to the several provinces for voluntary adoption is therefore self-evident.

While the Dominion has no jurisdiction over the mining laws of the provinces which own mining lands, it is hoped that the provisions of the federal law, by reason of their excellence and efficiency, will gradually be adopted by the various provinces.

In this connection a striking instance of concerted action by independent jurisdictions may be mentioned. Some years ago an exceedingly well-drawn act, which had become law in Great Britain, dealing with bills of exchange and promissory notes, was passed by the Dominion Parliament, which in Canada has jurisdiction over the subject matter, and by a majority of the state legislatures of the United States, so that it may now be said that this statute governs the greater part of the English-speaking world.

There is no reason why advantages similar to those which have been thus secured by the mercantile communities of Great Britain, the United States and Canada should not be obtained by the mining world.

At the present time, a discussion of the fundamental principles upon which such a mining law as is proposed should be based, and of the merits and deficiencies of such codes as that of Mexico, would be interesting and instructive, as bringing together, in useful form, the results of close observation and varied experience with the mining laws of the world.

There is no danger that any form of the so-called "apex law" will be again introduced into Canada. That law was copied under the influence of miners from the Pacific states, by British Columbia, but was finally abolished April 23, 1892, since which date the rights of the holder of a mineral claim are confined, in British Columbia, as in all other parts of Canada, to the ground bounded by vertical planes drawn through its surface boundary lines. The vested rights of claim-owners who had located their claims under former acts were protected; and the "apex law" in British Columbia, as elsewhere, has given rise to costly litigation, which seems inherent in the system of extra-lateral rights.

There are, however, other important questions to be discussed, such as how adequately to protect the prospector without at the same time introducing the danger of "blanketing;" the function of discovery in the acquistion of mining title; the most useful forms of working conditions, and the most efficient methods of enforcing such regulations. Last, but not least, the ever-present and ever-troublesome questions of taxation and royalties must be considered.

In dealing with these problems, Canada has, fortunately, the opportunity of taking full advantage of the results of mining codes in other countries and of her own unique experience of various systems of law.

The common law of England was introduced into the greater part of Canada. Space will not permit even a bald outline of the queenly features of My Lady of the Common Law. Her virtues have recently been eloquently commended by one of her most distinguished Knights, Sir Frederick Pollock, in his most recent publications.

Suffice it now to say that she has ever been the faithful friend

of liberty and justice, which, as Alexander Hamilton well said, is the end of government.

One must, however, lament that on this continent the gladsome light of her jurisprudence is often darkened by crude technicalities and by multiplying statutes of multitudinous legislatures, amended until the confusion of ill-considered legislation is often rendered more confounded.

That the reference to the common law is not merely a matter of antiquarian curiosity, but of present practical importance to the mining men of Canada, is sufficiently indicated by the fact that the rules laid down in the sixteenth century by the Justices of Queen Elizabeth, in the mines case, were successfully invoked in the nineteenth century, before their lordships of the Judicial Committee of Queen Victoria's Privy Council, in the precious metals case from British Columbia; and in the twentieth century before the judges of Queen Victoria's successor, Edward the Peace Maker, in the ophir case from Ontario.

In giving judgments in the latter of these cases, Sir John Boyd, Chancellor of Ontario, as reported in Ontario Mining Company *v.* Seybold, 31 Ontario Reports (1899), at page 399, used the following language:

"According to the law of England and of Canada, gold and silver mines, until they have been aptly severed from the title of the Crown are not regarded as '*partes soli*' or as incidents of the land in which they are found. The right of the Crown to waste lands in the colonies and the baser metals therein contained, is declared to be distinct from the title which the Crown has to the precious metals, which rests upon royal prerogative. Lord Watson has said in Attorney-General of British Columbia *v.* Attorney-General of Canada (1889), 14 App. Cas., at pp. 302, 303, these prerogative revenues differ in legal quality from the ordinary territorial rights of the Crown. These prerogative rights, however, were vested in Canada prior to the Confederation by the transaction relating to the civil list which took place between the Province and Her Majesty—the outcome of which is found in 9 Vict. ch. 114, a Canadian statue, which being reserved for the royal assent, received that sanction in June, 1846. The hereditary revenues of the Crown, territorial and others then at the disposal of the Crown, arising in the United Province of Canada were thereby surrendered in consideration of provisions being made

for defraying the expenses of the civil list. So that while the Crown continued to hold the legal title, the beneficial interest in them as royal mines and minerals, producing, or capable of producing revenue, passed to Canada. And being so held for the beneficial use of Canada they passed by section 109 of the British North America act to Ontario by force of site." On appeal to the Judicial Committee of the Privy Council, this judgment was affirmed.

The mining laws of Canada have been influenced, not only by the common law of England, but also both directly and indirectly, through the United States, by the customary rights of the bounders of Cornwall and Devon, by the sturdily asserted rights of the free miners of the Forest of Dean, and the Hundred of St. Briavel in Gloucester, and by the curious local customs according to which the lead mines of Derbyshire have been worked from time immemorial. These customs, as declared by the Imperial Parliament, were sanctioned by legislation; and the curious will find an interesting discussion of them in the judgments of the House of Lords in Wake *v.* Hall, 8 Appeal Cases, 195.

The analogy of one feature of the mining law of Cornwall has recently been followed to a considerable extent in Ontario, with very beneficial results, by the appointment of a judicial officer, known as the Mining Commissioner, who is clothed with very extensive authority and jurisdiction to determine mining disputes.

The Stannary Court exercised jurisdiction over the tinners in Cornwall, who forced recognition of their immemorial rights from King John. The jurisdiction of the Stannary Court extended to all suits, with certain exceptions where land, life or limb was involved, between miners, even though the cause of action did not arise from the working of the mines within the stannaries; and also to actions between miners and strangers, but in such cases, only to actions arising out of mining within the stanneries, unless the stranger attorned to the jurisdiction. The exceptions to the jurisdiction of the Stannaries Court, above referred to, were expressed in the famous Charter 33 Edward the First, granted to the miners in the words, "*exceptis placitis terrae et vitae et membrorum.*"

The leading rules of the mining law of the Province of Quebec were mainly derived from the French law, which in turn, was founded on the Roman. The civil law, though greatly modified, is still in force in the Province of Quebec. The rules of the later Roman law

were in force in Gaul at the time of the disruption of the Roman Empire, and were retained by the Gauls, dominating, not by reason of imperial power, but by the imperial power of reason.

These rules were brought by the French to the peaceful banks of the St. Lawrence, which were not disturbed by the thunders of L'Assemblée Nationale, or by its law of 1791, which declared, "*Les mines sont à la disposition de la nation.*"

Many mining men came to British Columbia from California, where parts of Spanish mining laws were still in force; and, beyond question, the laws of Spain have been indirectly a factor in moulding the mining laws of Canada.

In a very able and useful address before the Society of Arts in London, England, Dr. James Douglas has discussed the effect of the land and mining laws of the United States upon its marvelous development. One may be allowed to express the hope that Dr. Douglas will extend his exposition across the boundary line, so that his native country may, in connection with the revision, consolidation and codification of its mining laws, obtain the benefit of his penetrating insight, keen analysis and ripe experience.

In Canada there are immense deposits of economic minerals to reward the explorer, the miner and the investor. If Canadians choose, in perfecting their mining laws, they have at their disposal a marvelous wealth of experience, rich with the spoils of time and with the reasoned conclusions of the great systems of jurisprudence which have contributed most to civilization and to human progress.

The hope may be expressed that the legislators of this continent will constantly bear in mind the words of one of the greatest living authorities on jurisprudence, from whom I have already quoted, Sir F. Pollock, who states as the criteria of just laws in a civilized community: "Generality, equality and certainty," these three, but from the standpoint of the mining industry, the greatest of these is surely "certainty."